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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1007

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

This Petition for Writ of Certiorari seeks review of a decision by the United States Court of Appeals for the Tenth Circuit dismissing an appeal of the petitioner. Although the appeal was from all adverse rulings by the United States District Court of Kansas, the particular rulings which were the subject of the appeal were the denial of petitioner's Motion for Summary Judgment, the overruling of motions to stay a state court pro-

ceeding and the order by the District Court staying its own proceeding. The Stay Order was made after the state court proceeding had been tried and an appeal had been taken to the Kansas Supreme Court. The oral argument in the state court appeal has been set for March 6, 1970.

Petitioner's appeal was dismissed by the Court of Appeals for the reasons that the Notice of Appeal was out of time to all orders except the order staying the proceeding. The Stay Order, in the opinion of the court, was not an appealable order. (A 1)

ARGUMENT

Petitioner lists three reasons for granting Writ of Certiorari. The first is that the decision by the Court of Appeals that the Stay Order was not an appealable order is in conflict with decisions of this Court. The Court of Appeals' decision was based upon the well-established rule that a stay order is only appealable when a legal action is stayed to permit the prior determination of a related equitable matter. *Ephraim Freightways, Inc.* v. *Red Ball Motor Freight, Inc.*, 376 F.2d 40 (10th Cir. 1967); *Jackson Brewing Co.* v. *Clarke*, 303 F.2d 844 (5th Cir. 1962). The Court of Appeals found that the first prerequisite did not exist because the proceeding that had been stayed was not legal but equitable in nature.

It is obvious from petitioner's argument that he is not attacking the criteria adopted by the Court of Appeals for determining whether a stay order is appealable. What the petitioner is contesting is the court's finding that the proceeding that was stayed was essentially equitable in nature. The sole attack made on this finding is petitioner's contention that it was a legal impossibility for the Court of Appeals to find that this proceeding included relief in the form of a quiet title judgment. The premise on which

petitioner bases this contention is that a quiet title action cannot be brought by a party not in possession. Petitioner cites only one case from Arkansas which is supposedly authority for this position. Assuming this case represents the law in Arkansas, the rule in Kansas, which is the applicable state law, permits quiet title actions by parties not in possession. *Westbrook* v. *Schmaus,* 51 Kan. 558 (1893); 60 K.S.A. 1002; *Walker* v. *Rooney,* 135 Kan. 158.

The Court of Appeals also found that the proceeding included relief in the form of an accounting and an imposition of a trust upon certain funds. These types of relief the court found were also equitable in nature. Petitioner makes no attempt to argue in opposition to this finding.

Not one single decision by this Court has been cited by the petitioner which supports his argument that the Court of Appeals' decision is in conflict with decisions of this Court. The decision by the Court of Appeals was based on its finding that the stayed proceeding was equitable in nature. The only authority mentioned that possibly could be construed to be in conflict with the decision is a case from Arkansas which is not even the applicable state law.

Petitioner's alleged second reason for granting certiorari is that the decision by the Court of Appeals that the Notice of Appeal was untimely to all orders except the Stay Order is in conflict with decisions of other Courts of Appeal. As mentioned before, the appeal was from all adverse orders and rulings by the District Court. The Court of Appeals held the appeal was untimely to all orders except the Stay Order. Petitioner's opposition to the decisions appears to be only on behalf of the order denying petitioner's Motion to Vacate an earlier order. No argu-

ment has been made with respect to other orders in which the Notice of Appeal was also held to be untimely.

The order denying petitioner's Motion to Vacate was made by the District Court on September 9, 1968. An entry was made in the docket sheet that same date reciting that the Motion had been denied. On September 25, 1968, a written order was filed and noted on the docket sheet. This order stated that the Motion to Vacate had been denied. The Notice of Appeal was filed October 25, 1968.

The Court of Appeals held that the time for filing an appeal with respect to the Motion to Vacate commenced on September 9, 1968, when the clerk first entered the order on the docket sheet. Petitioner contends that this holding conflicts with the decision by the Fifth Circuit Court of Appeals in *Pure Oil Company* v. *Boyne*, 370 F.2d 121 (1966). The position of petitioner is that the *Pure Oil* case holds that the time for appeal does not start until September 25, 1968. The brief of co-respondents to this petition contains an authoritative discussion of when the time for Notice of Appeal begins. Their brief concludes that the Tenth Circuit decision is correct and is not conflicting with any decision of other Circuit Courts. It would be of no benefit to repeat this argument here. However, it should be mentioned and made clear that the only order which is in question as to the time of the appeal was the denial of a Motion to Vacate. Even the petitioner acknowledges that this order was not an appealable order.

The third reason stated by petitioner for granting certiorari is that the decision by the Court of Appeals that the State Court of Kansas may litigate another case involving matters related to this case is in conflict with decisions of this Court and the Supreme Court of Kansas. The written opinion by the Court of Appeals which is

part of the appendix to the petition clearly does not contain any decision with respect to the jurisdiction of the state courts of Kansas. Obviously, since the Court of Appeals did not rule on this matter, it cannot constitute a reason for granting certiorari. Apparently, petitioner is attempting to obtain another review of issues he raised in two other petitions for writ of certiorari filed with this Court (October Term Nos. 1031 and 1081). These petitions were denied and also petitions for rehearing were denied.

CONCLUSION

The reasons petitioner advances for granting certiorari are entirely without merit. Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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